No. 48840-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JEAN MARIE MANUSSIER,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-05274-1
The Honorable G. Helen Whitener, Judge

OPENING BRIEF OF APPELLANT

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1. Where the crime of identity theft requires the State to prove that a defendant possessed another person's means of identification or financial information with the intent to commit a crime, and where the evidence in this case consisted of the mere possession of a large number of items containing identification and financial information, but no evidence that any of that information was used or compromised, did the State fail to prove beyond a reasonable doubt that Appellant intended to commit a crime with the information she possessed? (Assignment of Error 1)

2. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Appellant does not have the ability to pay costs, she has previously been found indigent, and there is no evidence of a change in her financial

circumstances? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Jean Marie Manussier with one count of first degree identity theft (RCW 9.35.020(2)), 10 counts of second degree identity theft (RCW 9.35.020(3)), one count of possession of stolen mail (RCW 9A.56), and one count of bail jumping (RCW 9A.76.170). (CP 36-41) The jury convicted Manussier as charged. (CP 62-75; 9RP 24-26)[1] The trial court imposed a standard sentence under the drug offender sentencing statute, and imposed only mandatory legal financial obligations (LFOs). (CP 137-38, 140-41; 10RP 23, 28) Manussier timely appeals. (CP 162)

B. SUBSTANTIVE FACTS

In the early morning hours of December 30, 2014, Pierce County Sheriff Deputies Chad Helligso and Carl Olson conducted a routine traffic stop on a vehicle with expired tabs. (2RP 29, 31; 3RP 24-25) Jean Manussier was driving the vehicle, and her passenger identified himself as Andrew Gasaway.[2] (2RP 32; 3RP

[1] The transcripts, labeled with Roman numerals I through X, will be referred to by their volume number (#RP).

[2] The Deputies later learned that the passenger was actually named Nicholas Tilmon. (3RP 28, 35)

27) The Deputies saw a large amount of mail in the car, and noticed that it was not addressed to either Jean Manussier or Andrew Gasaway. (2RP 42-43; 3RP 27)

Deputy Helligso asked Manussier why she had mail addressed to other people, and Manussier responded that it was not hers and she did not know how it got there. (2RP 45) The Deputies continued to question Manussier, and she started to cry and asked the Deputies if she could put the mail back in a mailbox so it would be sent to the true owners. (3RP 37-38)

The Deputies impounded Manussier's vehicle and obtained a search warrant. (2RP 51; 3RP 39, 42) During the subsequent search, the Deputies collected mail addressed to a number of different people. (2RP 51, 54-57; 5RP 74) Among the items collected were credit card offers, utility and credit card bills, bank statements, IRS payments, and an un-cashed check in the amount of $23,500.00.[3] (2RP 81-82, 91-92, 100-01, 104-05; 3RP 107, 112, 153; 4RP 9-10, 11, 19, 32-33, 45, 60-61, 74, 75, 108-09, 167-68, 175; 5RP 14-15, 31, 33, 53)

[3] Possession of this check formed the basis for count 1 because its value exceeded $1,500.00. (CP 36) The remainder of the items of mail formed the basis for counts 2 thru 12 because their value was less than $1,500.00. (CP 36-41)

Deputy Olson testified that people sometimes steal mail out of mailboxes and trade it for narcotics, or use the information they gather from the mail to access credit card or bank accounts or obtain false lines of credit. (3RP 12, 20) However, the people whose information was contained in the items of mail removed from Manussier's car testified that their accounts were not compromised, their information was not used to obtain false lines of credit, and checks contained in the mail were never cashed or deposited. (2RP 88, 95-96, 5RP 44-45, 115-16; 4RP 16, 26, 51, 62, 67, 69, 81, 82-83, 113, 173, 176; 5RP 17, 19, 40-41)

Manussier testified that she allows other people to drive her car and that they often leave it filled with personal items and garbage. (7RP 8-9) She did not know that there was mail addressed to other people in her car because she had not noticed it before the Deputies asked her about it. (7RP 13-15) Tilmon also testified, and confirmed that other people besides Manussier sometimes drive the car, and that the day before he grabbed a bag of garbage that someone had left in the driveway of Manussier's home and put it in the back of the car. (6RP 165, 166, 168-69) He and Manussier never discussed taking or using other people's mail. (6RP 173)

IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MANUSSIER POSSESSED IDENTIFYING OR FINANCIAL INFORMATION WITH THE INTENT TO COMMIT OR AID IN THE COMMISSION OF A CRIME.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The identity theft statute provides, "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). First degree identify theft requires proof that the person "obtains

credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value." RCW 9.35.020(2). Second degree identity theft involves credit, money, goods, services, or anything else of value less than $1,500.00. RCW 9.35.020(3); State v. Sells, 166 Wn. App. 918, 923, 271 P.3d 952 (2012). Although there may have been sufficient evidence for the jury to find that Manussier knowingly possessed other persons' means of identification or financial information, there was insufficient evidence to find, beyond a reasonable doubt, the intent to use the identification or information to commit a crime in the future.

In closing arguments, the State explained what evidence it believed established Manussier's intent:

> So the final question is: Has the State proved beyond a reasonable doubt that the defendant acted with the intent to commit or aid or abet any crime, any crime, any crime like theft, any crime like unlawfully possessing a controlled substance. And I'm talking about narcotics. Possessing stolen property, obtaining stolen property. Those are any crimes that the defendant intended to commit.
>
> You heard the testimony of Deputy Olson with regard to the things that individuals can do that he has learned over the course of his experience in investigating identity theft cases. People get the mail. They can obtain from that mail credit cards .... They can trade that for drugs. They can use the information that they obtain to develop profiles. Then

> they can open new credit cards in those people's names. They can open checking accounts in those names. And they can use that information to make purchases, purchases that they ultimately don't pay for because they're using credit cards in other people's names; they're using debit cards in other people's names; they're using checks in other people's names.
>
> That is the intent that the defendant had in this case. Look at the number of people whose information she had in her vehicle .... So the defendant intended to commit or aid or abet any crime.

(8RP 94-95) Essentially, the State's position was that the jury should conclude that Manussier intended to commit a crime based solely on the volume of mail she possessed and what she could have done with that mail. The State's position is not supported by the law.

Intent to commit a crime may only be inferred from surrounding facts and circumstances if they "'plainly indicate such an intent as a matter of logical probability.'" State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)).[4] Intent may not be inferred from evidence that is "patently equivocal." Vasquez, 178 Wn.2d at 8; State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

[4] S*ee also* State v. Esquivel, 71 Wn. App. 868, 871, 863 P.2d 113 (1993); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Additionally, for crimes "where possession and intent are elements of the crime, Washington courts do not permit inferences based on naked possession. Rather, [courts] have consistently required the State to prove intent beyond a reasonable doubt." Vasquez, 178 Wn.2d at 8.

For example, in State v. Brockob, 159 Wn.2d 311, 318, 330-31, 150 P.3d 59 (2006), the Court considered whether a defendant who removed cold tablets containing pseudoephedrine from packaging and placed the tablets into his pockets acted with the requisite intent to manufacture methamphetamine. The Court answered no, determining that the State merely proved an intent to shoplift pseudoephedrine in excess of the legal purchase limit. 159 Wn.2d at 331. In other words, the "mere assertion that [pseudoephedrine] is *known to be used* to manufacture methamphetamine does not necessarily lead to the logical inference that Brockob intended to do so, without more." 159 Wn.2d at 331-32 (emphasis in original).

Washington courts have also employed the same analysis in reviewing convictions for possession of a controlled substance with intent to deliver, consistently holding that bare possession of a controlled substance does not suffice to support an inference of

intent to deliver. For example, in State v. O'Connor, 155 Wn. App. 282, 290, 229 P.3d 880 (2010), the court noted, "Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver"; rather, "[a]t least one additional fact must exist, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver." *See also* State v. Hutchins, 73 Wn. App. 211, 217, 868 P.2d 196 (1994) ("An officer's opinion of the quantity of a controlled substance normal for personal use is insufficient to establish, beyond a reasonable doubt, that a defendant possessed the controlled substance with an intent to deliver.").

Our State Supreme Court's opinion in Vasquez is also instructive. Vasquez was charged with forgery. 178 Wn.2d at 4. Under the forgery statute "[a] person is guilty of forgery if, with intent to injure or defraud: ... He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged." RCW 9A.60.020(1)(b). A store security guard suspected Vasquez of shoplifting. The guard searched Vasquez and found a forged social security card and permanent resident card inside Vasquez's wallet. 178 Wn.2d at 4-6. When the guard asked Vasquez if the cards were his, Vasquez responded "yes."

178 Wn.2d at 14-16. The Vasquez Court held this evidence was too equivocal to support the inference that Vasquez's possession of the forged cards was with the intent to defraud.

The Court also noted that "by requiring proof of intent to injure or defraud, the legislature has determined that mere possession of forged documents is not enough to sustain a forgery conviction. Rather, as courts both in- and outside Washington have held, the State must prove intent to injure or defraud beyond a reasonable doubt. The evidence that the State presented to demonstrate intent to injure or defraud was not sufficient because it either was patently equivocal or based on rank speculation." Vasquez, 178 Wn.2d at 17-18.

In holding that the facts before it did not allow an inference of intent to injure or defraud, the Vasquez Court distinguished cases where the defendants "actually presented their forged documents in hopes of defrauding law enforcement officers or employers." 178 Wn.2d at 12. By contrast, there was no evidence before the Vasquez court that Vasquez "had sought work, was working, or planned to work in the area. Neither did the State offer any evidence suggesting that Vasquez had used the forged social security and permanent resident cards to obtain employment or for

any other purpose." 178 Wn.2d at 17.

Forgery is similar to identity theft. Forgery requires the possession of an illegal written instrument and identity theft requires the possession of another's means of identification or financial information. Forgery also requires possession with intent to defraud or injure, and identity theft requires possession with intent to commit a crime. The two offenses both require the State to prove beyond a reasonable doubt "possession" and specific "intent." Just as the evidence in Vasquez was equivocal and insufficient to serve as a basis for inferring intent to defraud, the evidence in this case is equivocal and insufficient to prove that Manussier intended to commit or assist in the commission of a crime.

Like the defendant in Vasquez, Manussier possessed items commonly associated with the charged crime. But the circumstances did not "plainly indicate" her intent to use them to commit a crime. There was no evidence that any personal information was used to obtain credit, goods or services. There was no evidence that any financial accounts were compromised or

that existing checks or credit cards were used.[5] In fact, there was no evidence that Manussier presented or used any of the information or items within the mail found in her car for any purpose whatsoever.

The State's evidence rested entirely on the large quantity of mail and testimony about what crimes a person could commit with the information and items in that mail. But mere possession and "rank speculation" is not sufficient to prove, beyond a reasonable doubt, that Manussier intended to use the information to commit or aid in the commission of a crime. The State therefore failed to prove all of the essential elements of identity theft.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Manussier's identity theft convictions must therefore be reversed and dismissed.

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[5] Notably, the check underlying the first degree identity theft charged in count one was sent to the payee several weeks before Manussier's contact with the Deputies, yet the check was in the same condition as when it was sent and had not been deposited or endorsed. (4RP 74, 75)

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.[6]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of

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[6] In State v. Sinclair, Division 1 concluded a defendant should object to the imposition of appellate costs in the opening brief. 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). More recently, in State v. Grant, this Court disagreed with Sinclair and held that an appellant should object to the imposition of costs through a motion to modify a commissioner's ruling ordering costs. 2016 WL 6649269 at *2 (2016). But Manussier has included an objection to costs in this brief in the event that a higher court adopts the Sinclair reasoning at a future time, and because this Court also noted in Grant that "a defendant may continue to properly raise the issue of appellate costs in briefing or a motion for reconsideration consistently with Sinclair." 2016 WL 6649269 at *2.

whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Manussier's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Manussier owns no property or assets, has no savings, and has no job and no income. (CP 164) Manussier will be incarcerated for at least the next three years. (CP 40-41) And the trial court declined to order any discretionary LFOs at sentencing in this case after finding that Manussier was unlikely to have the ability to repay such costs. (CP 137-38; 10RP 28) Thus, there was no evidence below, and no evidence on appeal, that Manussier has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Manussier is indigent and entitled to appellate review at public expense. (CP 166-68) This Court should therefore presume that she remains indigent

because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). *See also* State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (noting that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs)".

Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Manussier's financial situation has improved or is likely to improve. Manussier is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

The State failed to prove that Manussier possessed mail and identifying information with the intent to commit or assist the commission of a crime, and her identity theft convictions must be reversed. This Court should also decline any future request to impose appellate costs.

DATED: November 30, 2016

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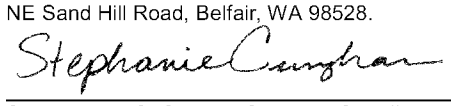

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